

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27**

Interstate Brands Corporation

Employer,

and

Case 27-RC-8295

Bakery, Confectionary, Tobacco Workers
and Grain Millers Local 401

Petitioner,

and

International Brotherhood of Teamsters, Local 222

Intervenor.

DECISION AND DIRECTION OF ELECTION

On November 26, 2003, Bakery, Confectionary, Tobacco Workers and Grain Millers Local 401, (the Petitioner), filed a petition under Section 9(c) of the National Labor Relations Act, as amended, (the Act), seeking to represent all hourly receiving clerks, at the Employer's Ogden, Utah facility, excluding guards and supervisors as defined in the Act. On December 8, 2003, a hearing was held before a Hearing Officer of the National Labor Relations Board, (the Board). Prior to the Hearing the Employer, the Petitioner and International Brotherhood of Teamsters, Local 222, the Intervenor, entered into a stipulation recognizing the

Intervenor's status in the proceeding and the existence of a question concerning representation. At the hearing the Petitioner moved to withdraw and the Hearing Officer reserved ruling on that motion. The Petitioner's motion to withdraw is granted. Because the Intervenor's showing of interest is sufficient, a question concerning representation remains to be determined.

At the conclusion of the hearing, the parties agreed that the following employees constitute an appropriate unit for the purposes of collective bargaining:

All full-time and regular part-time receiving clerks employed by the Employer at its Ogden, Utah facility, excluding all guards and supervisors as defined in the Act, and all other employees.

This case presents one issue for resolution: Whether receiving clerk David Owen, is a supervisor within the meaning of Section 2(11) of the Act. The Employer contends that Mr. Owen, who is one of three individuals employed in the receiving department, is a supervisor. The Intervenor maintains that Mr. Owen is a statutory employee. As discussed below, I conclude that the Employer has failed to meet its burden of establishing that Mr. Owen is a statutory supervisor, and therefore I shall include him in the bargaining unit sought by the Intervenor.

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, I find:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The parties stipulated, and I find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it is subject to the jurisdiction of the Board. Specifically, the parties stipulated, and I find, that the Employer, a Kansas corporation with multi-state operations, is engaged in the wholesale and retail distribution of baked goods, from various locations including the Ogden, Utah facility involved in this proceeding. During the past twelve months, the Employer has purchased and received goods at its Utah facility valued in excess of \$50,000 directly from suppliers located outside the State of Utah.

3. The parties stipulated, and I find, that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

5. It is appropriate to direct an election in the following group of employees:

INCLUDED: All regular full-time and part-time receiving clerk employees employed by the Employer at its Ogden Utah, facility.

EXCLUDED: All guards and supervisors as defined in the Act, and all other employees.

BACKGROUND

The Employer's Ogden, Utah facility bakes bread, pastries, and other associated food items for wholesale and retail sale and distribution. The Petitioner represents separate units of the Employer's production employees and maintenance employees and the Intervenor represents a unit of drivers. The three receiving clerks employed in the receiving department who are the subject of the Petition have never been represented. At present, these employees are David Owen, Robert Bray, and Chris Hovey.

Farrell Brown is the superintendent over both the sanitation and receiving departments and along with his assistant, Bob Thornock, is in overall control of the day-to-day operation of these departments. The parties stipulated that Mr. Farrell and Mr. Thornock are supervisors within the meaning of the Act. Because record evidence supports this stipulation, I find that Mr. Farrell and Mr. Thornock are supervisors within the meaning of the Act and are excluded, as statutory supervisors, from the unit found appropriate.

FACTS

A. Receiving Department Operations

The receiving department employees are responsible for receiving, storing, and distributing the raw ingredients and wrapper supplies delivered by the Employer's suppliers. As more fully discussed below, Mr. Owen's duties are to oversee these operations. In addition to the receiving, storing and distributing functions, Mr. Bray performs some cleaning functions and Mr. Hovey is

responsible for issuing raw ingredients to the production areas. Mr. Bray performs the duties of Mr. Owen and Mr. Hovey during their absences.

Generally, receiving department employees are not involved in ordering product. However, Mr. Owen does order granulated sugar, liquid sugar, yeast, and course salt from a list of suppliers provided by the Employer. He orders these products based on his knowledge of the necessary amounts of these items needed for production during various times of the year. In addition, Mr. Bray orders fruit from a cold storage facility, used by the Employer for that purpose, after the Employer purchases the stored fruit from outside suppliers.

The receiving department normally operates Monday through Friday from 7:00 a.m. until 3:30 p.m.. The shifts of receiving department employees are slightly staggered but their hours largely overlap. Mr. Brown is present at the facility for approximately ninety-nine percent of the time during the receiving department's hours of operation. Although not normally necessary, should anything of an unusual nature occur in the receiving department during Mr. Brown's absence from the facility, Brown is available to be called by telephone. All three receiving clerks have access to an office in the receiving area to make work related telephone calls.

Mr. Brown schedules work hours and vacations for the three receiving clerks without input from Mr. Owen. Each of the receiving clerks determines whether or not he must work overtime on any particular day. If the amount of overtime is excessive or overtime is worked too often, Mr. Brown reviews the matter with the employee. In scheduling annual vacations, Mr. Brown first goes

to Mr. Owen as the senior employee to determine his desired vacation times. Mr. Brown would then go to the other two employees by seniority to determine their vacation schedules. Mr. Brown schedules vacations to assure that only one employee is on vacation at any given time.

The record establishes that all three of the receiving clerks are hourly paid. Mr. Owen is the most senior employee and is paid \$17.60 per hour. The next most senior employee, Robert Bray, is paid an hourly rate of \$16.50 per hour and Chris Hovey is paid an hourly rate of \$13.20. The receiving clerks are all subject to the same terms and conditions of employment and receive the same benefits.

B. Record Evidence Offered to Establish Mr. Owen's Supervisory Status

As noted above, Mr. Owen's duties are to oversee the operations of the receiving department. These duties include inspecting trucks for cleanliness and assuring the correctness of the product delivered by inspecting seal numbers on the vehicle and associated documents. Mr. Brown testified that Mr. Owen's position is sensitive and critical in its content because the Employer is subject to many governmental regulatory inspections involving cleanliness and Mr. Owen's duties involve him in assuring compliance with those regulations. Mr. Owen is also responsible for the Employer's "security control program". This program contains a myriad of safeguards to ensure the safe and proper receipt, storage, and ultimate delivery to the Employer's production areas, of the items delivered to the Employer by its suppliers.

Mr. Brown testified in conclusory terms that Mr. Owen is a supervisor and that the position occupied by Mr. Owen has historically been considered a non-union position. Mr. Brown testified that because of the great responsibility involved in the performance of Mr. Owen's duties, the Employer has "set up" the position occupied by Mr. Owen as that of a supervisor. The responsibilities cited by Mr. Brown as establishing the supervisory status of Mr. Owen are his responsibilities for assuring compliance with government regulations and the Employer's security program. Mr. Owen admittedly attends no management meetings.

The record contains little evidence with respect to the exercise of supervisory authorities affecting the receiving clerks, other than those regarding vacation and overtime scheduling that are handled by Mr. Brown and discussed above. The record does disclose that during the past several years only one employee, Chris Hovey, has been hired in the receiving department. Mr. Hovey was transferred from the sanitation department where he had been employed for approximately two months. Mr. Brown testified that he "would have gone to [Mr. Owen] and asked if he knew anything about [Hovey], what he thought of him." However, there is no evidence in the record that Mr. Brown actually sought Mr. Owen's input or that Mr. Owen was thereafter involved in the decision to hire Mr. Hovey in any way. Mr. Owen indirectly testified that he did not have such involvement by his testimony that he was not aware Mr. Hovey would be transferring to the receiving department until he reported for work. Also, when

the position had come open, Mr. Owen had mentioned the name of a different interested candidate to Mr. Brown, and the individual was not hired.

The record contains only one example of the asserted discipline of a receiving department employee. Recently, Mr. Owen felt that Mr. Bray was “talking” to the point that it interfered with the efficient operation of the receiving department. Mr. Owen spoke to Mr. Bray about the issue and then informed Mr. Brown. Mr. Brown in turn spoke to Mr. Bray and told him that he couldn’t talk to other employees to the point that it interfered with the receiving function. Mr. Brown testified that he considered this communication to Mr. Bray a verbal warning. The record does not develop this incident further with regard to what reliance, if any, Mr. Brown put on the report of Mr. Owen. The record also does not develop whether the original discussion of the problem by Mr. Owen with Mr. Bray was also considered an oral warning. The record does not reflect any other receiving clerk employees otherwise disciplined or discharged.

ANALYSIS AND CONCLUSIONS

A. Applicable Law on Supervisory Status

As noted above, the sole issue to be determined is whether David Owen should be excluded from the unit as a supervisor within the meaning of the Act.

Section 2(3) of the Act excludes “any individual employed as a supervisor” from the Act’s definition of “employee”, thereby excluding supervisors from the Act’s protections. Section 2(11) of the Act defines a “supervisor” as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or

discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) has been interpreted to set forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held in the interest of the employer. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706, 121 S.Ct. 1861, 1867, 149 L.Ed.2d 939 (2001).

The burden of proving supervisory status lies with the party asserting that such status exists. NLRB v. Kentucky River Community Care, Inc., *supra*; Michigan Masonic Home, 332 NLRB 1409 (2000). The Board has been careful not to construe the language of the statute relating to supervisory status too broadly, because once an individual is found to be a supervisor, that individual is denied the rights of employees protected by the Act. St. Francis Medical Center-West, 323 NLRB 1046 (1997); Hydro Conduit Corporation, 254 NLRB 433, 437 (1981). In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with genuine management prerogatives should be considered supervisors and not straw bosses, leadmen, set-up men and other minor supervisory employees. See Chicago Metallic Corporation, 273 NLRB 1677, 1688 (1985), *affd.* In relevant part 794 F.2d 527 (9th Cir. 1986). See also Providence Hospital, 320 NLRB 717, 725 (1996), citing McCollough Environmental Services, 306 NLRB 565 (1992). When the evidence is in conflict

or inconclusive with regard to particular indicia of supervisory status, the Board will not find supervisory status based on those indicia. Davis Memorial Goodwill Industries, 318 NLRB 1044 (1995); Phelps Community Medical Center, 295 NLRB 486, 490 (1989).

The issue to be determined is whether the Employer has satisfied its burden of showing that David Owen is a supervisor by a “preponderance of credible evidence.” Star Trek: The Experience, 334 NLRB 246, 251 (2001). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See Willamette Industries, Inc., 336 NLRB 743 (2001). The fact that the Employer has given the position at issue the title of “supervisor” is of no consequence, as the Board has long held that a title is insufficient to establish supervisory status. See, e.g., Omnix International Corporation d/b/a Waterbed World, 286 NLRB 425 (1987).

B. Conclusions Regarding Supervisory Status

I find that the evidence is insufficient to establish by a preponderance of the credible evidence that the position held by David Owen is a supervisory one. Therefore, I find that the Employer has failed to meet its burden of demonstrating the supervisory status of the position currently occupied by Mr. Owen.

The conclusionary testimony of Mr. Brown that Mr. Owen is a supervisor is not sufficient to support the Employer's position. The Board has held that “[C]onclusionary statements made by witness in their testimony, without supporting evidence, does not establish supervisory authority.” Tree-Free Fiber

Co., 328 NLRB 389, 393 (1999); Sears Roebuck & Co., 304 NLRB 193 (1991).

The record establishes that the principal duties of Mr. Owen are those of a receiving clerk. The additional duties cited by Mr. Brown to support the Employer's assertion that Mr. Owen is a supervisor are not statutory authorities relevant to the finding of supervisory status, rather these duties simply reflect that Mr. Owen is an employee in a position of responsibility. Finally, Mr. Owen's lack of involvement in issues that are admittedly supervisory in character further evidences his lack of supervisory status.

The principle duties of Mr. Owen are similar to those of other receiving employees in terms of his receiving and ordering product and his position is part of the Employer's integrated system of receiving, storage and distributing product to the Employer's production areas. Mr. Owen, like other department employees is hourly paid and not significantly more than other employees in light of his additional responsibilities.

Mr. Owen's additional duties related to compliance with government regulations and to carrying out the Employer's security program, while indications of the importance and responsibility of his position, are not relevant to the issue of his supervisory status. Similarly, the fact that the Employer considers that the position is a nonunion one is not relevant to resolution of the issue of supervisory status.

I find that the limited testimony on matters relevant to the possession and exercise of supervisory authorities are insufficient to establish that Mr. Owen is a supervisor. Mr. Owen attends no management meetings. The record

establishes that it is Mr. Brown who exercises supervisory authorities in the receiving department. Mr. Brown is responsible for receiving department scheduling work hours and vacations. The record also establishes that it is Mr. Brown who exercises supervisory authority with respect to the review of overtime.

The record does not establish that Mr. Owen was involved in the hire of any employees, including Mr. Hovey. Mr. Owen testified that he had no advance notice that Mr. Hovey was being considered for the position and the record does not establish that the employee Mr. Owen mentioned to Mr. Brown as being interested was given any consideration. Similarly, the record is insufficient to establish that Mr. Owen acted in a supervisory capacity in the issuance of any employee discipline, including Mr. Bray's oral warning. It was Mr. Brown who issued the warning. The record does not establish what weight Mr. Brown attached to the previous report of Mr. Owen concerning the incident nor does the record establish that the discussion of Mr. Owen with Mr. Bray carried the weight of disciplinary action by immediately or potentially affecting terms and conditions of employment.

Finally, there is no record evidence that Mr. Owen appraises employees, schedules their hours, responsibly directs their work by the use of independent judgment, adjusts their grievances, or exercises any of the other statutory indicia of supervisory status. Accordingly, I find that Mr. Owen is included in the bargaining unit and is eligible to vote in the election.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted among the employees in the Unit found appropriate at the time and place set forth in the Notice of Election to issue subsequently, subject to the Board's Rules and Regulations.¹ Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such a strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date

¹ Your attention is directed to Section 103.20 of the Board's Rules and Regulations. Section 103.20 provides that the Employer must post the Board's Notice of Election at least three full working days before the election, excluding Saturdays and Sundays, and that its failure to do so shall be grounds for setting aside the election whenever proper and timely objections are filed. Please see the attachment regarding the posting of election notice.

and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 222

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the **full** names and addresses of all the eligible voters shall be filed by the Employer with the Undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office, National Labor Relations Board, 700 North Tower, Dominion Plaza, 600 Seventeenth Street, Denver, Colorado 80202-54533 on or before **December 30, 2003**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in

Washington by **January 6, 2004**. In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

Dated at Denver, Colorado this 23rd day of December 2003.

B. Allan Benson, Regional Director
National Labor Relations Board, Region 27
600 Seventeenth Street
700 North Tower, Dominion Plaza
Denver, Colorado 80202-5433